> dure requires legislative, not judicial, action; but the Legislature in amending this article should be careful not to incorporate in it any provision that would subject the statute to an attack on the ground of denial of due process of law." *State v. Chianelli*, 226, La. 552, at 559-560, 76 S. (2d) 727 (1954).

Furthermore, an analysis of the cases on the subject of "evasion" reveals situations so strained as to amount practically to bad faith on the part of state courts. Thus in *Rogers vs. Alabama*, 192 U.S. 226, 24 Sup. Ct. 257, 48 L.Ed. 417 (1904), defendant's motion to quash the indictment on the ground of systematic exclusion of Negroes was stricken by the trial court. The Supreme Court of Alabama affirmed the trial court's action under a statute which provided that the court could strike from the record pleadings which were unnecessarily prolix. The United States Supreme Court reversed the conviction, pointing out that the entire motion setting up a constitutional right was only two pages in length. Manifestly, there is absolutely no similarity between the action of the Alabama Supreme Court in *Rogers* and that of the Louisiana Supreme Court in *Wilson* and in the instant case.

As a matter of fact, it is submitted that "evasion" can be found only in the *application* of a state statute to a particular situation, as in *Rogers*, not in the *interpretation* of a statute as in *Wilson*,

since an interpretation necessarily affects all litigants alike and applies in all cases, whether or not they involve federal rights.

Certainly it would be more than unjust to brand the concern of the Louisiana Supreme Court for the protection of federal rights which is manifest in its opinions in *Wilson* and in the subsequent cases involving Article 202 as an "evasion". So obvious is it that the *Wilson* decision does not involve an "evasion" that this Court dismissed the appeal in that case with a per curiam opinion.

IV.

R.S. 15:202 as interpreted in the Wilson case is a valid procedural statute which does not unreasonably interfere with the assertion of federal rights.

It is clear that there must be some time in the course of a criminal proceeding after which it will be too late to raise certain pleas. Otherwise, a defendant could wait until he is convicted before raising his objection, and thus get two or more trials instead of one. As Mr. Justice Clark said in his dissent in *Williams v. Georgia*, 349 U. S. 375 at 403, 75 Sup. Ct. 814, 99 L.Ed. advance p. 703 (1955):

> "A State may be influenced by the unfairness of allowing the litigant who remains silent two chances for acquittal while giving the diligent litigant only one. And orderly

administration of the laws often imposes hardships upon those who have not properly preserved their rights."

Louisiana has decided that the proper limitation upon the filing of a plea attacking a grand jury is three days after the expiration of the term of the grand jury. This gives everyone at least three days, and in most instances more than three days, to attack the grand jury. The motion to quash is itself a simple document, and certainly no great amount of research or study is required to raise the issue of systematic exclusion. See, for example, the simplicity of the very document filed in this case. (R. 15-16). Thus, little or no preparation or study was required by petitioner's counsel.

What is Louisiana's purpose in establishing this time limitation? The *Wilson* case gives two answers to this question:

1. "This Court, in the case of State v. Strickland, supra, in interpreting the provisions of Section 11 of Act No. 44 of 1877, and, in State v. White, supra, in applying the provisions of Article 202 of the Code of Criminal Procedure, pointed out that the Legislature intended to require an accused to file his objections and pleas to any defect or irregularity in the drawing or the selecting of a juror or jury or venire or array within a certain period of time, in order to prevent the defendant from going to trial on the merits, and, in the

event he were convicted, assure himself of another trial by withholding his pleas as to any error or irregularities in the drawing and selecting of the jury, venire and array. It is apparent that the Legislature took into consideration the fact that timeliness in filing such pleas was necessary to the effective and proper administration of justice by the State."

2. "Persons charged with offenses under indictments are usually not brought to trial for months and sometimes for years after the time when the members of the grand jury who returned them have gone out of office. The persons who composed the array from which the venires were drawn are very likely to be scattered over a wide area within a reasonable time after the grand jury term ends. If a defendant, under the law, were granted the right to raise this type of objection and file this character of pleading at any time before trial, it is easy to see that in innumerable instances the State would be put at serious disadvantage in making its proof and this would result in a great many guilty persons escaping justice. Apparently, our Legislature had this in mind because under Section 16 of Act No. 135 of 1898, the defendant was granted the right to file these types of objections and pleadings at any time before the beginning of the trial of the case. The members of the Legislature in 1928 changed that statute

> by placing into the Code of Criminal Procedure Article 202." *State v. Wilson*, 204 La. 24, at 47, 48; 14S. (2d) 873 (1943).

Moreover, the state's requirement of an early raising of the plea gives the state a better opportunity to correct whatever errors might have been made.

Thus, it is submitted that the *Wilson* doctrine is not a sinister anti-federal doctrine. It is a reasonable, understandable, properly motivated doctrine, adopted for the purpose of fostering the orderly administration of justice. It is applicable not solely to Negroes, nor to motions to quash based upon federal rights. It applies to all persons and to all types of objectons.

It is well settled that state procedural devices will be upheld by this Court if they provide a reasonable opportunity to raise federal questions. Thus, in *Parker v. Illinois*, 333 U.S. 571, 68 Sup. Ct. 708, 92 L.Ed. 886 (1948), this Court upheld an Illinois practice which established a waiver of federal questions where an appeal was taken to an intermedite appellate court rather than to the Illinois Supreme Court. The Court said:

> "When federal rights are involved, it is, of course, for this Court finally to determine whether the failure to follow the procedure designated by a State for their protection constitutes a waiver of them. *Davis v. O'Hara*, 266 U.S. 314; *Central Union Co. v. Edwards-*

ville, supra. The Court said in the *Edwardsville* case that when the waiver is founded on a failure to comply with the appellate practice of a State, the question turns on whether that practice gives lit gants 'a reasonable opportunity to have the issue as to the claimed right heard and determined' by the State Court. 269 U.S., pp. 194-195." (333 U.S. 571 at 574).

In *Bailey v. Commonwealth*, 193 Va. 814, 71 S.E. 2d 368 (1952), the Supreme Court of Virginia affirmed the trial court's decision rejecting a motion attacking the grand jury on the ground of discrimination, holding that the attack was not timely. *This Court denied certiorari.* (344 U.S. 886, 73 Sup. Ct. 186, 91 L.Ed. 686, 1952).

Yakus v. United States, 321 U.S. 414, 64 Sup. Ct. 660, 88 L.Ed. 834 (1944), involved a federal statute somewhat similar to Article 202 of the Louisiana Code of Criminal Procedure. The Emergency Price Control Act of 1942 provided that the validity of a price regulation could not be attacked in a criminal proceeding for violation thereof unless a protest was filed with the Administrator within a sixty-day period. Defendant failed to file a protest timely and was convicted. In affirming the conviction the United States Supreme Court said:

"No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil

cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *O'Neil v. Vermont*, 144 U. S. 323, 331; *Barbour v. Georgia*, 249 U.S. 454, 460; *Whitney v. California*, 274 U.S. 357, 360, 362, 380. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. *Seaboard Air Line Ry. Co. v. Watson*, 287 U.S. 85. While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, see Brandeis, J. concurring in *Whitney v. California*, *supra*, 389, and it could hardly be maintained that it is beyond legislative power to make the rule inflexible in all cases. Compare *Woolsey v. Best*, 299 U.S. 1 with *Ex parte Siebold*, 100 U.S. 371." (321 U.S. 414, 444-445).

The opinion in the *Yakus* case (Footnote 3, 321 U.S. at p. 435) cites a number of other federal cases in which limited periods for resort to administrative relief as a prerequisite to proceeding in court have been held to be sufficient. In *Bellingham Bay & B.C.R. Co. v. New Whatcom*, 172 U.S. 314, 19 Sup. Ct. 205, 43 L.Ed. 460 (1899), a ten day period for such action was held reasonable.

In view of the simplicity of the pleading required to urge the illegality of a grand jury, it cannot be seriously argued that a statute which

always affords at least three days and generally much longer period is unreasonable. (Compare *Avery v. Alabama*, 308 U.S. 444, 60 Sup. Ct. 321, 84 L.Ed. 377 (1940), in which the Supreme Court of the United States held that a delay of less than three days between the appointment of counsel and the *trial* in a capital case was a reasonable time.) As this Court pointed out in *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 Sup. Ct. 330, 78 L.Ed. 674 (1934), a state is "free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. . . . Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." See *Stein v. N.Y.*, 346 U.S. 156, 73 Sup. Ct. 1077, 97 L.Ed. 1522 (1953), approving the *Snyder* decision.

It is submitted therefore that Article 202 as interpreted in the *Wilson* case establishes a sound and valid procedural step, and that it provides a reasonable opportunity for anyone — white or black — to raise any question, including the question of systematic exclusion, with respect to grand juries.

CONCLUSION

It is respectfully submitted that this Honorable Court does not have jurisdiction of this case, the decision of the Louisiana Supreme Court being based on an adequate non-federal ground (*State v. Wilson*, supra); that the writ in this case should therefore be declared to have been improvidently granted; and that the judgment of the Louisiana Supreme Court should be affirmed.

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CERTIFICATE

This is to certify that a copy of this brief has this day been delivered to the Hon. Gerard H. Schrieber and the Hon. George H. Fust, Pere Marquette Bldg., New Orleans, Louisiana, Attorneys for the petitioner, by depositing the same and addressing to him, as aforesaid, in the United States mail at New Orleans, Louisiana.

New Orleans, Louisiana, this _____ day of September, 1955.

Assistant Attorney General